(14)

Supreme Court, U.S.
FILED
JUL 15 2005
OFFICE OF THE CLERK

No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN LEGION IN SUPPORT OF PETITIONERS

PHILIP B. ONDERDONK, JR.
National Judge Advocate
THE AMERICAN LEGION
P.O. Box 1055
Indianapolis, IN 46206

ROBERT P. PARKER
Counsel of Record
ANDREW J. PUGLIA LEVY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Counsel for Amicus Curiae

July 15, 2005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....(iii)

INTEREST OF *AMICUS*.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....5

I. THE COURT SHOULD DEFER TO CONGRESS' UNIQUE CONSTITUTIONAL AUTHORITY OVER MILITARY AFFAIRS AND NATIONAL SECURITY.....5

II. THE GOVERNMENT HAS A COMPELLING INTEREST IN ENSURING THAT THE MILITARY CAN RECRUIT HIGHLY EDUCATED, CIVILIAN-TRAINED OFFICERS FROM DIVERSE BACKGROUNDS.....11

A. Civilian-trained Officers are Essential for a Well-rounded Military that Reflects and Protects the Country's Values.....12

B. Lack of On-campus Military Recruiting Would Significantly Hinder the Military's Ability to Recruit Sufficient Officers—Both Quantitatively and Qualitatively.....16

C. JAG Officers Play an Indispensable Role in an Increasingly Complex Military.....18

III. THE SOLOMON AMENDMENT IS NARROWLY TAILORED.....22

A. On-campus Recruiting is the Military's Most Effective Tool to Create a Strong, Diverse JAG Corps.....22

B. The Alternatives Cited by the Third Circuit are Inadequate 25

IV. THE THIRD CIRCUIT'S REASONING WOULD PERMIT ANY INSTITUTION TO DENY THEIR STUDENTS ACCESS TO MILITARY RECRUITERS ON THEIR CAMPUSES FOR ANY REASON 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Brown v. *Glines*, 444 U.S. 348 (1980) 10

Burns v. *Wilson*, 346 U.S. 137 (1953) 19

Dynes v. *Hoover*, 61 U.S. 65 (1857) 19

Forum for Academic and Institutional Rights v. *Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) ... *passim*

Gilligan v. *Morgan*, 413 U.S. 1 (1973) 5

Goldman v. *Weinberger*, 475 U.S. 503 (1986) 7, 9

Greer v. *Spock*, 424 U.S. 828 (1976) 10

Grutter v. *Bollinger*, 539 U.S. 306 (2004) 15, 16

Haig v. *Agee*, 453 U.S. 280 (1981) 11

Hamilton v. *Regents of the University of California*, 293 U.S. 245 (1934) 17

Nomi v. *The Regents for the University of Minnesota*, 5 F.3d 332 (8th Cir. 1993) 17, 18

Orloff v. *Willoughby*, 345 U.S. 83 (1953) ..... *passim*

Parker v. *Levy*, 417 U.S. 733 (1974) ..... *passim*

Regan v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983) 24

Rostker v. *Goldberg*, 453 U.S. 57 (1981). ..... *passim*

Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 5

Soloario v. *United States*, 483 U.S. 435 (1987) 7, 9

United States v. *Grimley*, 137 U.S. 147 (1890) 19

United States v. *O'Brien*, 391 U.S. 367 (1968) 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 1 5

U.S. CONST. art. I, § 8, cl. 11-14, 18 5

STATUTES

141 Cong. Rec. E13-01 (Jan. 4, 1995) 8

142 Cong. Rec. H5715 (May 30, 1996) 8

141 Cong. Rec. H5963 (June 14, 1995) 12

142 Cong. Rec. H7335 (July 11, 1996) 8

National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968) 10

Department of Defense Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970) .. 10

Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) 10

National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663. 7

Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1260 (1999) 8

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811 (2004) 8

10 U.S.C. § 503(c) (2004) 27

10 U.S.C. § 654 (1993) 2

10 U.S.C. § 983(b)(1) (2004) 7, 27

36 U.S.C. §§ 21701-08 (2005) ..... *passim*

MISCELLANEOUS

Adam Liptak, *Colleges Can Bar Army Recruiters*, N.Y. TIMES, Nov. 30, 2004 23

Andrew Rosenthal, Editorial, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004 21

Anne Gearan, *Detainees' Lawyers Challenge Supreme Court*, ASSOC. PRESS, Jan. 14, 2004 21

Beth Asch & James R. Hosek, *Looking to the Future: What Does Transformation Mean for Military Manpower and Personnel Policy?* (RAND Corp. 2004) 14

Beth Potier, *ROTC Commissioning Ceremony Stresses Importance of Scholars and Soldiers*, HARVARD UNIV. GAZETTE, June 8, 2005 12

Bylaws of the Association of American Law Schools, art. VI, § 6-3(b) 16

Brief for Judge Advocates Association as *Amicus Curiae* 18

Captain Eugene Y. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, 2004-JUN Army Law. 33 (2004) 26

Caroline Hendrie, *High Court Orders New Review of Michigan Title IX Case*, EDUC. WK. 28, 2005 WLNR 7939974, May 11, 2005 28

Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994) 12, 23

Dean Paton, *Rift Over Recruiting at Public High Schools*, CHRISTIAN SCI. MONITOR, May 18, 2005 29

Declaration of Major General Jack L. Rives, U.S. Air Force, *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (03-4433) ..... *passim*

Declaration of Rear Admiral Jeffrey L. Fowler, U. S. Navy, *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (03-4433) ..... *passim*

Declaration of Brigadier Gen. Walter E. Gaskin, U.S. Marines, *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (03-4433) ..... *passim*

Declaration of Dr. David S. C. Chu, Undersecretary of Defense for Personnel and Readiness, *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (03-4433) 26

Declaration of Major General Thomas J. Romig, U.S. Army, *Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (03-4433) ..... *passim*

American Association of Law Schools Executive Director Carl Monk, *Memorandum to Deans of Member Schools* (January 24, 2000) 17

Final Report of the ROTC Task Force, Columbia University, (May 6, 2005) ..... *passim*

Hearing Before Senate Comm. on Armed Services To Receive Testimony on the Status of the U.S. Army and U.S. Marine Corps in Fighting the Global War on Terrorism, 109th Cong. (2005) 15

Hearing Before the Subcomm. on Military Readiness of the House Armed Services Comm., 107th Cong. (2002) 14

James Gordon Meek, *At War with Gitmo Grilling*, N.Y. DAILY NEWS, Feb. 13, 2005 21

Major General Jack Rives, *Expeditionary Law: Remarks on How to Succeed in the Deployed Environment*, 51 A.F.L. REV. 345 (2001) 20

Major Gen. Michael D. Rochelle, *Remarks at Army Recruiting Commander Briefing* (May 20, 2005) 16

MICHAEL S. NEIBERG, MAKING CITIZEN SOLDIERS: ROTC AND THE IDEOLOGY OF AMERICAN MILITARY SERVICE (Harvard Univ. Press 2000) ..... *passim*

Pamela Hess, *Military Lawyers Criticize Tribunal*, UNITED PRESS INT'L, Jan. 15, 2004 21

Robert Burns, *Army Headed to Recruiting Shortfall*, ASSOC. PRESS, June 8, 2005 16

Ryan Foley, *UW-Stout Chancellor Reverses Decision on ROTC, Fearing Loss of Federal Funds*, DULUTH NEWS TRIB., June 1, 2005 27

THE FEDERALIST NOS. 23, 26 (Alexander Hamilton) (Penguin Classics, ed. 1987) 6

THOMAS P.M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY (Putnam 2003) 14

Tom Regan, *Military Lawyers Advised Pentagon Two Years Ago to Protect Prisoners*, CHRISTIAN SCI. MONITOR, May 17, 2004 21

T. Trent Gegax & Evan Thomas, *The Family Business*, Newsweek (June 20, 2005) 13

RULES

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 47.3 1

BRIEF *AMICUS CURIAE* OF THE AMERICAN LEGION

Pursuant to Rule 47.3, *amicus curiae* The American Legion respectfully submits this brief in support of petitioners and asks that the judgment below be reversed.[1]

INTEREST OF *AMICUS*

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than 2,600,000 current and former members of our Armed Forces. Congress chartered the Legion as a corporation in 1919. *See* Act of September 16, 1919 ch. 59, 41 Stat. 284 (currently codified at 36 U.S.C. §§ 21701-08 (2005)). The Legion's statutory purposes include upholding and defending the Constitution of the United States and supporting its members' service to their country. *See* 36 U.S.C. § 21702. Towards these ends, the Legion long has worked to foster patriotism, character and good citizenship—as well as the military ideal of the citizen-soldier.

The Legion's commitment to collective responsibility and a military composed, in part, of citizen-soldiers is reflected in the Preamble to its Constitution: The Legion seeks to "inculcate a sense of individual obligation to the community, state and nation; [and to] combat the autocracy of both the classes and the masses." Preamble, The American Legion Const.

---

[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* has received consent to file this brief from counsel for petitioners and respondents. The letters evidencing such consent have been filed with the Clerk of Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

There is no test for Legion membership except for honorable military service in the United States Armed Forces during a period of hostilities. *See* 36 U.S.C. § 21703.[2] Nor does the Legion poll its members as to their personal beliefs. In all likelihood, the Legion's more than 2.6 million members have widely divergent views on government policies, including the so-called "Don't Ask, Don't Tell" law regarding homosexuals in the military. *See* 10 U.S.C. § 654 (1993). Indeed, the Legion has at least one Post comprising almost exclusively homosexual veterans—the Alexander Hamilton Post in San Francisco, California.

However, this case is not about "Don't Ask, Don't Tell," or any other law or military policy. At issue is the constitutionality of the Solomon Amendment. That is, does Congress have the discretion to withhold certain federal funds (*i.e.*, taxpayer dollars) from those institutions of higher learning that, for any reason, choose to interfere with the military's ability to carry out the government's most crucial constitutional duty—namely, to provide for the national defense of the United States.

SUMMARY OF ARGUMENT

Recruiting is the lifeblood of our modern, all-volunteer military. For the more than 30 years since Congress abolished the draft, the military has relied on recruitment directly from our nation's colleges and universities to sustain the strength and excellence of our Armed Forces across various disciplines. Along with the military academies, colleges and universities—through the Reserve Officers Training Corps ("ROTC") and on-campus

[2] An individual also is eligible for membership if the individual has served honorably in the Armed Forces of "a government associated with the United States during a period [of hostilities] and was a citizen of the United States when the individual entered that service." *See* 36 U.S.C. § 21703(1)(B).

recruiting from graduate and undergraduate programs—are the primary source of active-duty and reserve officers.

The Solomon Amendment was enacted in furtherance of Congress' compelling interest in promoting effective military recruiting as a fundamental component of our national security. Denying military recruiters equal access to the men and women of our institutions of higher learning would impede the military's ability to ensure an officer corps, including judge advocates, not only of sufficient size, but of quality and diversity as well. Indeed, the officers recruited from colleges and universities serve an important purpose beyond mere manpower: By virtue of having been educated in civilian institutions, these officers bring a perspective and values to military service that complement, and counterbalance, the worldview brought to the service by professional officers graduated from the academies. This need is especially acute in the Judge Advocate General's Corps (the "JAG Corps"), which implements a system of military justice in accordance with the Uniform Code of Military Justice and advises military and civilian leaders on a wide range of legal matters, including the laws of engagement, international law, and, recently, the handling of detainees in the War on Terror.

The Third Circuit's conclusion that Congress could serve this compelling interest through more narrowly tailored means, such as television and radio advertisements, *see Forum for Academic and Institutional Rights (F.A.I.R.)* v. *Rumsfeld*, 390 F.3d 219, 234-35 (3d Cir. 2004), is unrealistic; the fact that the private sector relies so heavily on on-campus recruitment demonstrates the wisdom of Congress' conclusion that there simply are no adequate substitutes for individualized, face-to-face interactions between the men and women of the military and interested students. At the same time, institutions and the students who attend them may exercise their First Amendment rights

by parading, picketing and protesting against any government policy they find objectionable.

Importantly, the Third Circuit's reasoning, if adopted, would impose significant barriers to military recruitment extending far beyond law school campuses and the specific objection to alleged discrimination involved in this case. But for the Solomon Amendment, medical, nursing and engineering schools, for example, as well as undergraduate liberal arts institutions, would be free to halt military recruiters at their gates, leaving the military without any recourse. High school recruiting would be in danger, too, as the law governing military access to high schools is substantially similar to the Solomon Amendment. And under the regime urged by respondents and endorsed by the Third Circuit, schools would be able to prohibit military recruiting based on nothing more than an objection to a particular law or military policy, or even a mere whim, and yet continue to receive taxpayer funding. Merely by providing equal access to military recruiters, however, educational institutions can avoid the Solomon Amendment's consequences *and* freely object to that with which they disagree.

The Solomon Amendment thus is an appropriate exercise of the Constitutional powers granted Congress with respect to the military, and deserves the deference this Court traditionally affords to Congressional judgments in matters of military affairs and national security. To conclude otherwise would subjugate the military's ability to function effectively—and thus to provide for the national security of the United States—to the caprice of our country's colleges and universities.

ARGUMENT

I. THE COURT SHOULD DEFER TO CONGRESS' UNIQUE CONSTITUTIONAL AUTHORITY OVER MILITARY AFFAIRS AND NATIONAL SECURITY.

Article 1 of the United States Constitution grants Congress broad powers over military affairs and national security. The Constitution bestows on Congress the "Power To . . . provide for the common Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Congress also is authorized "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11; "[t]o raise and support Armies," *id.* cl. 12; "[t]o provide and maintain a Navy," *id.* cl. 13; "[t]o make Rules for the Government and Regulation of land and naval Forces," *id.* cl. 14; and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," *id.* cl. 18.

This Court has acknowledged the breadth of Congress' constitutional authority in these areas. *See, e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981) ("This Court has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies.") (citing *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975)); ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.") (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). Moreover, the Court has explained that it must tread carefully on matters involving the military and national security, both because the judiciary is insulated from political review, *see Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) ("It would be difficult to think of a clearer example of the type of governmental action that was

intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process."), and because it lacks the necessary expertise, *see id.* ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.") (quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953)) (emphasis in original).[3]

---

[3] As Alexander Hamilton explained in support of broad legislative authority over military affairs:

> The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under direction of the same councils which are appointed to preside over the common defense.
>
> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal. The Means ought to be proportionate to the End; the persons from whose agency the attainment of any End is expected, ought to possess the Means by which it is to be attained.

THE FEDERALIST No. 23, 146-51 (Alexander Hamilton) (Penguin Classics, ed. 1987) (discussing art. I, § 8, cl. 12). Hamilton also observed that: "The idea of restraining the Legislative authority, in the means of providing for the national defense, is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened." *Id.*, No. 26, 164-71.

Recognizing Congress' constitutional mandate and the shortcomings of extensive judicial involvement, the Court consistently has deferred to Congress' judgments regarding military affairs. *See Soloario* v. *United States*, 483 U.S. 435, 447 (1987) (stating that "judicial deference . . . is at its apogee" when Congress' authority to govern military affairs is challenged) (quoting *Rostker*, 453 U.S. at 70); *Orloff*, 345 U.S. at 93-94 ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *see also Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986) (stating that the courts "must give great deference to the professional judgment of military authorities concerning the relative importance of a particularly military interest"). This Court, of course, remains the final arbiter of constitutional questions; however, "the tests and limitations to be applied may differ because of the military context." *Rostker*, 453 U.S. at 67

The law at issue in this case represents the collective judgment of Congress on the issues of military personnel and national security, matters uniquely within Congress' constitutional purview. The Solomon Amendment provides that the funds of certain federal agencies may be withheld from institutions of higher education that deny military recruiters access to their campuses and students equal to that which they provide other employers. *See* 10 U.S.C. 983(b)(1).[4] Representative Solomon explained the rationale behind the law during a floor debate, stating that:

---

[4] The law does not allow the withholding of "any Federal grant of funds to an institution of higher education . . . available solely for student financial assistance or related administrative costs." Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1212 (1999).

> [R]ecruiting is the key to our all-volunteer military forces, which have been such a spectacular success. Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges and informing young people of the increasing opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. H7335 (daily ed. July 11, 1996) (statement of Rep. Solomon); *see also* 141 Cong. Rec. E13-01 (daily ed. Jan. 4, 1995) (statement of Rep. Solomon) ("Barring military recruiters is an intrusion on Federal prerogatives . . . and an impediment to sound national security policy."); 142 Cong. Rec. H5715 (daily ed. May 30, 1996) (statement of Rep. Goodlatte) ("Campus recruiting is a vitally important component of the military's effort to attract our Nation's

---

Earlier versions of the Solomon Amendment did not have a reference to "equal access." *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663 (1994) (denying federal funds to institutions of higher learning that "has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses."). However, Congress determined that equal access was an important and necessary component of recruitment and amended the Solomon Amendment in 2004. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811 (2004). As currently amended, the Solomon Amendment does not mandate access, or demand a specified level of access; rather, the law conditions federal funds on equal access to an "institution of higher education" or a "subelement" of such an institution, if the institution or subelement "has a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1).

best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military").

Congress' judgment in this case is entitled to no less deference because it pertains to recruitment. In *Rostker* v. *Goldberg*, a class of males argued that the Military Selective Service Act ("MSSA") violated the Fifth Amendment's due process clause by authorizing the President to require the registration of males but not females. *See* 453 U.S. at 63 & n.4. In upholding the law, the Court rejected the notion that a lesser amount of deference was due Congress' judgment in enacting the MSSA because the law was not concerned with day-to-day military operations. *Id.* at 68. It also rejected the suggestion that the MSSA "involves civilians, not the military," and that "the impact of registration on the military is only indirect and attenuated." *Id.* In a statement equally applicable to on-campus recruiting, the Court explained that, "these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, [are] singularly unpersuasive." *Id.* (citing and quoting *O'Brien*, 391 U.S. 367). Moreover, "[r]egistration is not an end in itself in the civilian world but rather the first step in the induction process into the military one." *Id.* The same is true of on-campus recruiting. Like registration, it is a critical early step in the induction of men and women into our modern, all-volunteer military. In light of this fact, "[i]t would be blinking reality to say that [the Court's] precedents requiring deference to Congress in military affairs are not implicated by the present case." *Id.* at 68-69.

Nor does the Court necessarily view the presence of an asserted competing constitutional interest as a bar to Congressional action in the military sphere. *See, e.g.*, *Goldman*, 475 U.S. 504 (upholding uniform regulations to freedom of religion challenge); *Rostker*, 453 U.S. 57

(upholding conscription law that discriminated on the basis of sex); *Brown* v. *Glines*, 444 U.S. 348 (1980) (upholding regulations that imposed prior restraint on right to petition of military personnel); *Greer* v. *Spock*, 424 U.S. 828 (1976) (upholding law banning political speeches by civilians on military base); *Parker* v. *Levy*, 417 U.S. 733 (1974) (upholding provisions of Military Code of Criminal Justice that infringed on freedom of speech).

For practical and institutional reasons, the Court has turned a skeptical eye on challenges to laws that affect military affairs, including recruitment, even when other constitutional principles are invoked. A change of course in this case would be especially inappropriate because Congress is not directly regulating or infringing on law schools' First Amendment rights or academic freedom, but merely placing conditions on the conduct required to receive certain federal funds. Students and facilities remain free to protest recruiters or to take any other ameliorative steps to express their disagreement with a given law or military policy. As Judge Aldisert stated in his dissent from the Third Circuit's opinion, the cases involving civilian affairs relied on by the majority are simply not analogous to this case where "an act of Congress was not only authorized by various Clauses in Articles I and II, but commanded by them." *F.A.I.R.*, 390 F.3d at 250 (Aldisert, J., dissenting).[5]

[5] Moreover, although the Solomon Amendment has received significant recent attention, for almost forty years Congress has conditioned certain federal funds to institutions of higher education allowing military recruiters on their campuses. *See, e.g.*, Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) (restricting distribution of Department of Defense funds to institutions of higher education that bar military recruiters from their campuses); Department of Defense Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970) (same); National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968) (restricting distribution of NASA funds).

II. THE GOVERNMENT HAS A COMPELLING INTEREST IN ENSURING THAT THE MILITARY CAN RECRUIT HIGHLY EDUCATED, CIVILIAN-TRAINED OFFICERS FROM DIVERSE BACKGROUNDS.

This Court has stated that "[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (internal quotations omitted). The Solomon Amendment directly furthers this interest.

The military's ability to recruit highly qualified officers, including judge advocates, from diverse backgrounds is inextricably bound with its ability to provide a strong, competent military, able to protect the national security of the United States. As the Court has recognized, "a military officer holds a particular position of responsibility and command in the Armed Forces." *Parker*, 417 U.S. at 744. "The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee[,] he is named to the specific rank during the pleasure of the President." *Id.* (quoting *Orloff*, 345 U.S. at 91). Effective officer recruiting depends on equal access to the men and women of our colleges and universities. *See* Decl. of Major Gen. Thomas J. Romig, U.S. Army ¶ 21, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Army").

A. Civilian-trained Officers are Essential for a Well-rounded Military that Reflects and Protects the Country's Values.

Although this case arises in the context of JAG recruiting, the Solomon Amendment is critical to the officer corps generally: The law supports the ideal of a military of shared duty, reflective of our core values as a Nation and with the educational backgrounds necessary to address our modern national security challenges. These principles are consistent with the military's commitment to an officer corps that consists of both professional officers and those educated by our civilian institutions.

Indeed, the "citizen-soldiers" produced by our colleges and universities are necessary "to counterbalance . . . the professional officers coming out of the academies . . . [and] bring to military service a wider and more rounded background." MICHAEL S. NEIBERG, MAKING CITIZEN SOLDIERS: ROTC AND THE IDEOLOGY OF AMERICAN MILITARY SERVICE 2-3 (Harvard Univ. Press 2000); *see* Col. Charles J. Dunlap, Jr. *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 390 (1994) (recommending that to "broaden the[ir] outlook," military academy cadets and mid-level officers should spend at least one year at leading university); Beth Potier, *ROTC Commissioning Ceremony Stresses Importance of Scholars and Soldiers*, HARVARD UNIV. GAZETTE, June 8, 2005 ("The need for having a viable, national-level citizen-soldier commissioning program like ROTC is abundantly clear. . . . [T]he cadets and ensigns of ROTC [are] critical decision-makers who reflect the broad spectrum of America's colleges and universities."). Congress recognized the need for such a broad and diverse officer corps when it passed the Solomon Amendment. *See* 141 Cong. Rec. H5963 (daily ed. June 14, 1995) (statement

of Rep. Solomon) ("We depend on our all-volunteer military. We want that cross-section of America.").

Historically, institutions of higher learning themselves have recognized an interest in training officers and providing the skills necessary for a strong military. *See* Neiberg, *supra*, at 133 (quoting, for example, executive director of state college and university association, in 1970: "[T]he belie[f] that officers in the military should come from institutions all over the country, and that this diversity of background held to maintain a democratic leadership in the military . . . is a principle which we would not surrender lightly"). These institutions acknowledged that skilled officers were critical to our country's national defense but refused to cede their training exclusively to the military academies. *Id.* at 3. Instead, they concluded—at times in the face of intense pressure from students and professors—that maintaining their institutions' influence on the military outweighed any temporary objections to the military policy of the day. *Id.* at 103. Stated differently: Institutions of higher learning were concerned less with the military's presence on their campuses than with their students' presence in the military.

The civilian-military gap has widened at many colleges and universities since the time of the Vietnam War.[6] However, some modern-day academics continue to understand the value of training citizen-soldiers, including as a means to counter an objectionable law or policy. The co-chair of Columbia University's Task Force on ROTC, for

---

[6] During World War I and World War II, graduates of Ivy League schools such as Harvard and Yale gave their lives in "disproportionate numbers"; this year, by contrast, Princeton's graduating class of 1,175 student included only 8 who chose careers in the military. *See* T. Trent Gegax & Evan Thomas, *The Family Business*, Newsweek, at 24 (June 20, 2005).

example, said in support of an ultimately unsuccessful resolution to reestablish the ROTC on campus that: "[T]he most powerful agent of change we can provide is Columbia-educated leaders for the military. . . . You cannot effect change without engaging an issue. Universities are vital when they educate and irrelevant when they boycott." *Final Report of the ROTC Task Force, The Case for ROTC at Columbia* (statement by James H. Applegate), at *15-16 (May 6, 2005), *at* http://www.columbia.edu/cu/senate/committees/rotc/0505rotcreport.htm.

The military's need for highly educated officers with varied perspectives is especially pronounced as it engages in the fight against terrorism and employs increasingly complex strategies and technologies. *See Hearing Before the Subcomm. on Military Readiness of the House Armed Services Comm.*, 107th Cong. (2002) (statement of Gen. Donald G. Cook, Commander, Air Education and Training Command, U.S. Air Force) ("Education requirements have grown in recent years due to the . . . increased need for specialized education and training in today's dynamic combat environment."). In the War on Terror, the enemies we face are often asymmetrical in capabilities and non-traditional in tactics. Creative, progressive thinking therefore is crucial as we conceive future military strategies. *See generally* THOMAS P.M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY 9-59, 89-96 (Putnam 2003) (explaining need for new operating theory for national security and military operations in post-Cold War environment and describing rise of asymmetrical threats); *see also* Beth Asch & James R. Hosek, *Looking to the Future: What Does Transformation Mean for Military Manpower and Personnel Policy?*, at 2 (RAND Corp. 2004) (quoting Sec. of Defense Donald Rumsfeld: "Transformation must encourage a culture of creativity and intelligent risk taking

and promote a more entrepreneurial approach to developing military capabilities.") (internal quotations omitted). Officers not steeped in the pre-9/11 military doctrines of the academies are an important part of this effort.

Furthermore, modern-day officers need to be well educated in the history, culture, politics and sensibilities of the world's diverse populations to effectively represent our country abroad. Recognizing this, the military is "more aggressively pursuing leaders' education now than during any other period of conflict in our history. In addition to preparing leaders for specific billets, [the military is] educating them to promote intellectual pluralism, increase their cultural awareness, and to encourage a 'lifetime of learning'." *See Hearing Before Senate Comm. on Armed Services To Receive Testimony on the Status of the U.S. Army and U.S. Marine Corps in Fighting the Global War on Terrorism*, 109th Cong. 5 (2005) (statement of Gen. Peter J. Schoomaker, Chief of Staff, U.S. Army). Because civilian-trained officers embrace "a value system . . . consistent with American society, by virtue of having lived in a civilian environment," Neiberg, *supra*, at 3, they help ensure that our military exports an accurate impression of America's values and ideals as our strategic engagements bring us in contact with other cultures and religious faiths.

Civilian-trained officers also increase the racial diversity of the military, something that this Court and the military have deemed to be of vital importance. Just last Term, in *Grutter* v. *Bollinger*, the Court cited an *amici curiae* brief submitted by "high-ranking retired officers and civilian leaders of the United States military" in support of the Court's conclusion that law schools have a compelling interest in a diverse student body. 539 U.S. 306, 331 (2004). The Court explained that: "Based on [their] decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill

its principle mission to provide national security." *Id.* (internal quotations and citation omitted).

B. Lack of On-campus Military Recruiting Would Significantly Hinder the Military's Ability to Recruit Sufficient Officers—both Quantitatively and Qualitatively.

Even under the best of conditions, military recruiters must overcome several obstacles in convincing students to forego careers in the private sector in favor of joining the military. In the case of law students, many law firms and other private employers hire recent law graduates at considerably higher salaries for jobs that demand significantly less personal sacrifice. The military, by contrast, cannot negotiate salaries and has limited ability even to negotiate where a student will be stationed. *See* Decl. of Rear Admiral Jeffrey L. Fowler, U.S. Navy ¶ 6, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Navy").

But the current conditions are far from ideal. Military recruiters presently face the most challenging recruiting environment in the history of our all-volunteer military. *See* Major Gen. Michael D. Rochelle, *Remarks at Army Recruiting Commander Briefing* (May 20, 2005), *available at* http:// www.defenselink.mil/transcripts/2005/tr20050520-2881.html. Unemployment is at sustained historic lows. And with the soldiers, Marines, sailors, Coast Guardsmen and airmen of our Armed Forces engaged in extended combat in Afghanistan, Iraq and elsewhere, the demand for new recruits is severe. *See, e.g.*, Robert Burns, *Army Headed to Recruiting Shortfall*, ASSOC. PRESS, June 8, 2005 (stating that Army likely will fall short of its full-year recruiting goal for first time since 1999). The Solomon Amendment encourages institutions that benefit from taxpayer funds to give the military a fair chance to identify officer candidates.

Although most law schools currently comply with the Solomon Amendment rather than forgo federal funds, many would stop granting access to military recruiters if the Solomon Amendment was struck down. The bylaws of the Association of American Law Schools ("AALS"), to which 166 of the 189 law schools accredited by the American Bar Association belong, require member law schools to exclude from recruiting on their campuses any employer that discriminates in hiring based on, among other things, sexual orientation. *See* Bylaws of the AALS, art. VI, § 6-3(b), *at* http://aals.org/bylaws.html. Given the potential financial impact on schools that do not comply with the Solomon Amendment, the AALS has amended its nondiscrimination policy to provide an exception for military recruiting. *See* AALS Exec. Dir. Carl Monk, *Memorandum to Deans of Member Schools* (January 24, 2000), *at* http://aals.org/00-2.html. However, but for the Solomon Amendment, nearly 88 percent of the nation's ABA-accredited law schools would follow the AALS bylaws and ban the military from recruiting on their campuses without any federal consequences.

This would cripple the military as it attempts to maintain a well-rounded JAG Corps that is filled with the most talented and diverse law students available. *See* Decl. of U.S. Army ¶ 10 (stating that sixty percent of all new judge advocates are recruited from civilian ranks). As discussed below, the role of the JAG Corps in the military—and our society—it too important to be so hindered. *Cf. Hamilton* v. *Regents of the Univ. of Cal.*, 293 U.S. 245, 263 (1934) ("Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government.").[7]

---

[7] At least one circuit court has indicated that individual students are without recourse as well. In *Nomi* v. *The Regents for the University of*

C. JAG Officers Play an Indispensable Role in an Increasingly Complex Military.

The complexity, breadth and importance of the issues that judge advocates participate in require the best and brightest attorneys available. Judge advocates are deployed throughout the world, providing direct advice and assistance on a daily basis to combatant commanders on issues such as military justice, the rules of engagement, target lists, the establishment of war crime tribunals, international treaties and the law of armed conflict. *See* Decl. of U.S. Navy ¶ 1, at 2; Decl. of Brigadier Gen. Walter E. Gaskin, U.S. Marines ¶ 1, at 2, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Marines"). Judge advocates also are involved in non-combat operations, including humanitarian and disaster relief missions. Decl. of U.S. Army ¶ 5. And, as explained more thoroughly in the *amicus curiae* brief submitted by the Judge Advocates Association, judge advocates in all branches of the Armed Services are providing critical support in the War on Terror. *See generally* Brief for Judge Advocates Association as *Amicus Curiae* at 8-11. From offensive operations against suspect terrorists to civil rebuilding projects, judge advocates are supporting their commanders and fellow soldiers.

Judge advocates also administer a system of military justice intended to field a disciplined, effective military

---

Minnesota, 5 F.3d 332 (8th Cir. 1993), the Eighth Circuit dismissed a law student's challenge to the University of Minnesota Law School's policy of prohibiting the military from recruiting on campus. The student, who wished to meet with military recruiters, argued that the school's policy violated his First Amendment rights. The court concluded that because the student had graduated by the time of his appeal, the case was moot. Given the time it takes for a case to work its way through the judicial system, other students likely would face a bar to full adjudication of similar constitutional claims.

force and ensure that the rights of all military personnel are safeguarded. *See* Decl. of U.S. Army ¶ 6. This role of the military lawyer as protector and enforcer of military law is crucial considering the closed nature of military society, *see Parker*, 417 U.S. at 743 ("[T]he military is, by necessity, a specialized society separate from civilian society."), and the unique laws that govern it, *id.* ("[M]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.") (quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953)); *see also Dynes* v. *Hoover*, 61 U.S. 65, 79 (1857) (explaining that Congress may provide for trial and punishment of military and naval offenses in manner practiced by civilized nations, and such power has no connection with judicial power defined by third article of the Constitution).[8]

The functioning of the military justice system is vital not only to the everyday operations of our Armed Forces, but also to the image and perception of the United States abroad. Indeed:

> The ability to fairly and equitably address misconduct and simultaneously deter others from wrongdoing ultimately bolsters the operational effectiveness of our military by maintaining the trust between service members, host nations, and the American people, thereby strengthening the national security interests of the United States.

Decl. of Major Gen. Jack L. Rives, U.S. Air Force ¶ 5, *F.A.I.R.* (03-4433) (hereinafter "Decl. of U.S. Air Force"). JAGs have been called on in this capacity recently in several

---

[8] Further, "[a]n Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right of command in the officer, or the duty of obedience in the soldier." *United States* v. *Grimley*, 137 U.S. 147, 153 (1890).

high-profile matters, including the courts martial of those involved with the publicized incidents at Abu Ghraib and charged with misconduct on the battlefield of Iraq. Regardless of the outcome of these cases, the proper functioning of the military justice process bolsters the credibility of the military and emphasizes our country's commitment to the Rule of Law.

Military lawyers' understanding of military justice also occasionally serves to counterbalance the members of the military's civilian leadership and to restrain military policy, especially in wartime. As Major General Jack L. Rives, U.S. Air Force, has explained:

> It's especially important in the deployment environment for judge advocates to balance their 'can do' approach to mission accomplishment with the need to say 'no' when 'no' is the right answer. Deployed commanders often have a heightened sense of mission and of the need to accomplish important matters 'sooner than later.' But sometimes, the law will not permit commanders to do what they want to do, when they want to do it. . . . The JAG must explain the rules, provide the right advice always, and preclude problems by telling commanders what they need to know—even when it's difficult.

Maj. Gen. Jack Rives, *Expeditionary Law: Remarks on How to Succeed in the Deployed Environment*, 51 A.F.L. REV. 345, 349 (2001).

For example, citing the Constitution, federal law, the Geneva Conventions and the Uniform Code of Military Justice, JAG officers representing certain detainees at Guantanamo Bay, Cuba recently challenged the legal

authority of the government to try the detainees by military tribunal. *See, e.g.*, Anne Gearan, *Detainees' Lawyers Challenge Supreme Court*, ASSOC. PRESS, Jan. 14, 2004 (describing military lawyers' urging for access to civilian review as between that of government and detainee activists); *see also* Pamela Hess, *Military Lawyers Criticize Tribunal*, UNITED PRESS INT'L, Jan. 15, 2004 (describing military lawyers' actions as "watershed" event for America's military legal community).

JAG officers also have been front and center on the controversy over the treatment of detainees at Guantanamo Bay, Cuba. A JAG officer assigned to a war crimes task force drafted a memo objecting to certain aggressive interrogation policies allegedly urged, in part, by the military's civilian leaders. *See* James Gordon Meek, *At War with Gitmo Grilling*, N.Y. DAILY NEWS, Feb. 13, 2005; *cf.* Andrew Rosenthal, Editorial, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004 (quoting Jeh Johnson, former Secretary of Air Force: "Military lawyers . . . tend to see things through the prism of how it will affect their people if one gets captured or prosecuted"). And before the media was reporting the allegations at Abu Ghraib, a group of military lawyers, displeased with the decisions of their politically appointed supervisors on the issue of interrogations, met with the Association of the Bar of New York City. The group subsequently compiled a report that examined the government's policies and United States and international law governing the treatment of military prisoners. *See* Tom Regan, *Military Lawyers Advised Pentagon Two Years Ago to Protect Prisoners*, CHRISTIAN SCI. MONITOR, May 17, 2004.

Thus, JAGs act as a bridge between civilian and military institutions and as a check on overzealous policy. The ability of military lawyers to offer such balanced and

independent views, however, requires a JAG Corps with diverse perspectives and backgrounds and the capacity to effectively address both sides of difficult issues.

III. THE SOLOMON AMENDMENT IS NARROWLY TAILORED.

A. On-campus Recruiting is the Military's Most Effective Tool to Create a Strong, Diverse JAG Corps.

The Third Circuit purported to "balanc[e] the First Amendment interests implicated by the Solomon Amendment with competing societal interests to determine whether the statute transgresses constitutional boundaries." *F.A.I.R.*, 390 F.3d at 234. Although the court assumed the government's interest in "recruiting talented lawyers" is compelling, it concluded that the balance does not tip in the government's favor because "the means must be carefully tailored to achieve those ends." *Id.* According to the court, "[u]nlike a typical employer, the military has ample resources to recruit through alternative means," which "may be more costly" but are not necessarily less effective. *Id.* at 234-35.

The court's perspective is flawed. On-campus recruiting is the single most effective means for the military to make initial contact with a broad range of prospective applicants and to discuss the benefits of a career in the JAG Corps. *See* Decl. of U.S. Marines ¶ 6; Decl. of U.S. Navy ¶ 4. Without equal access to law schools, the potential applicant pool would be limited to those already familiar with, and interested in, military careers. Indeed, for students without a military background, the primary means of learning about a career in the JAG Corps are law school career services offices and on-campus contact with JAG Corps representatives. *See* Decl. of U.S. Army ¶ 7. For many students, this representative is the first judge advocate they will have ever met. *See* Dunlap, Jr., *The Erosion of Civilian Control of the U.S. Military*, *supra*, at 367 ("As military service becomes increasingly rare among the general population and as military education programs disappear from many college campuses, few opportunities allow for contact with anyone associated with the armed forces.").

Thus, access to law school campuses provides students with what is arguably the most important aspect of military recruiting—personal interaction with the men and women of the Armed Forces. *See* Decl. of U.S. Navy ¶ 4; Decl. of U.S. Marines ¶ 8. An Air Force survey indicated that "over 43% of the [Air Force] JAGs who have been selected from 2000 to 2004 stated that their face-to-face on-campus interview were critical in their decision to apply." Decl. of U.S. Air Force ¶ 19. This is not surprising. The position of respondents notwithstanding, uniformed servicemen and women are not widely regarded as "bigots." *See* Adam Liptak, *Colleges Can Bar Army Recruiters*, N.Y. TIMES, Nov. 30, 2004, at A1 (quoting counsel for F.A.I.R. in reference to Third Circuit's decision: "Enlightened institutions have a First Amendment right to exclude bigots"). Rather:

> [t]hroughout our history, especially in times of war, like the present conflicts in Afghanistan and Iraq, and the military campaign against the Al Qaeda, a completely different impression is invoked [by uniformed officers on campus]. The men and women in uniform are almost universally considered as heroes, sacrificing not only their lives and well-being but living separate from all the comforts of stateside living.

F.A.I.R., 390 F.3d at 251 (Aldisert, J., dissenting).[9] Exposure to those who have chosen a life of service and sacrifice is crucial to the military's ability to recruit like-minded individuals.

Furthermore, compared with private law firm jobs, the JAG Corps selection process is extremely complicated and protracted. *See* Decl. of U.S. Marines ¶¶ 3-4; U.S. Air Force ¶¶ 9-12 (describing many stages of recruitment and accession process). On-campus interviews provide recruiters the opportunity to demystify this process and provide answers to critical questions concerning the unique role of the JAG Corps and the many advantages associated with serving as a military attorney—including public service and greater exposure and legal experience than those in the private sector. *See* Decl. of U.S. Navy ¶ 7; Decl. of U.S. Air Force ¶ 17. These on-campus meetings can be especially enlightening because, in many cases, the recruiters are recent law school graduates who can relate to students and their various concerns and questions. *See* Decl. of U.S. Navy ¶ 7. Finally, as a practical matter, on-campus interviews are the easiest and most convenient for the students themselves, who are busy with classes and other school-related activities. The advantages of being present on campus—as opposed to requiring students to travel to a nearby hotel or recruiting office—are evidenced by the importance private employers place on the same access. *See* Decl. of U.S. Marines ¶ 6 ("Employers engage in on-campus recruiting primarily because it's easy for students.").

---

[9] This Court has expressed similar sentiments: "Veterans have been obliged to drop their own affairs and take up the burdens of the nation . . . subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 550-51 (1983) (internal citations and quotations omitted).

Law schools clearly understand the benefits of on-campus contact with students, as well. Many of the nation's top law schools boast about the effectiveness and, thus, importance of their on-campus, law-firm recruiting programs. *See, e.g.*, Columbia Law School Career Services Website, *at* http://www.law.columbia.edu./careers/career_services/admitted (stating that Columbia organizes "one of the largest, most comprehensive on-campus recruiting in the country," and that "[m]ore than 70% of second-year students secure employment in the early fall through these [on-campus recruiting] programs."); Boston College Law School Fall Recruitment Guide, *at* http://www.bc.edu/schools/law/services/career/jobsearch/recruitguide (stating that "[a] significant percentage of the second and third-year students will accept positions as a result of fall recruiting" while others "will find their positions in the spring"); Stanford Law School Office of Career Services Website, *at* http://www.law.stanford.edu.admin.ocs/employers/recruiting (stating that "[t]he majority of our 2L and 3L students participate in, and find employment through," the fall campus interview program).

If the government is enjoined from enforcing the requirements of the Solomon Amendment, the JAG Corps' ability to meet its recruiting mission—*i.e.*, to attract and recruit a highly educated and diverse applicant pool, sufficient to meet current strength requirements—will be degraded, along with the military's ability to further the national security of the United States. *See* Decl. of U.S. Army ¶ 23; Decl. of U.S. Air Force ¶ 31.

B. The Alternatives Cited by the Third Circuit are Inadequate.

Among the alternatives to on-campus recruiting that the Third Circuit offered were student loan repayment programs and "sophisticated recruitment devices," such as television

and radio advertisements. *F.A.I.R.*, 390 F.3d at 234-35. Implicit in the court's statement is that the government, unlike private law firms, has unlimited resources to devote to recruiting for the Armed Services. This clearly is not the case. But even if it were, these alternatives are inadequate substitutes for on-campus recruiting.[10]

First, although the military is experimenting with supplemental recruiting approaches, including multi-media campaigns, *see* Cap. Eugene Y. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, 2004-JUN ARMY LAW. 33, 38 (2004), these efforts cannot replace one-on-one interaction with law students. *See* Decl. of Dr. David S. Chu, Dep't of Def. ¶ 6, *F.A.I.R.* (03-4433) (hereinafter "Decl. of Dep't of Def."); Dec. of U.S. Air Force ¶ 32; Decl. of U.S. Navy ¶ 4. One of the rationales for law schools' extensive fall and spring recruiting campaigns is to provide students with a discrete period of time to concentrate primarily on employment matters. Some schools even schedule their fall recruiting programs before classes begin, so that students have no distractions. Radio and television advertisements or additional scholarships cannot replace this sort of devoted attention. *See* Decl. of U.S. Army ¶ 22; Decl. of U.S. Marine Corps. ¶ 8.

---

[10] The court also stated that the "ill-will" generated toward the military as the result of the Solomon Amendment actually impedes military recruitment. 390 F.3d at 235. Given its position in this case, the military obviously disagrees. Furthermore, the court's argument just as logically cuts the other way—that is, the Solomon Amendment is critical to law schools' advocacy against "Don't Ask, Don't Tell." Without the Solomon Amendment, law schools would be free to ban military recruiters from their campuses. There would be no cause for student and faculty protests on campus; no moment for public statements to the media or elsewhere; and no need for prominent disclaimers of the allegedly discriminatory law. In other words, it is Congress' insistence on a military presence that has given rise to these activities, which, in turn, have effectively and publicly disseminated law schools' message.

Second, the government's financial resources are finite. The monies necessary to implement the "more costly" alternatives cited by the court are currently devoted to other areas. Even apart from recruiting, the growing demands of the war in Iraq and the global military environment, as well as the domestic budgetary process in general, are placing increasing constraints on the military's resources. *See* Decl. of Dep't of Def. ¶ 7. It is not clear which of the funds currently invested in the war on terror or supporting our soldiers, Marines, sailors, Coast Guardsmen and airmen the court suggests the military divert.

IV. THE THIRD CIRCUIT'S REASONING WOULD PERMIT ANY INSTITUTION TO DENY THEIR STUDENTS ACCESS TO MILITARY RECRUITERS ON THEIR CAMPUSES FOR ANY REASON.

Nothing in the Third Circuit's reasoning is limited to law schools, or the current controversy over alleged discrimination in military hiring. If adopted, the Solomon Amendment's application to other institutions of higher learning—including graduate medical, nursing, engineering schools, as well as undergraduate colleges and universities—would be in jeopardy. *See* 10 U.S.C. § 983(b)(1) (referring only to "an institution of higher education").

Many colleges and universities, for example, currently allow ROTC on campus only out of fear of losing federal funds through operation of the Solomon Amendment. *See, e.g.*, Ryan Foley, *UW-Stout Chancellor Reverses Decision on ROTC, Fearing Loss of Federal Funds*, DULUTH NEWS TRIB., June 1, 2005. And Columbia University is comfortable maintaining its ban on ROTC despite having "made the difficult decision" to allow military recruiters on campus only because "[t]here has not yet been an attempt to

enforce the . . . ROTC-related provisions of the Solomon Amendment." *Final Report of ROTC Task Force*, *supra*, at *11.

High school military recruiting also could be affected. Although the Solomon Amendment does not regulate military recruiting at high schools, a separate law, the so-called Hutchinson Amendment, requires substantially similar access and thus is vulnerable to the same arguments levied by the law schools in this case. *See* 10 U.S.C. § 503(c) (2004);[11] *see also* Caroline Hendrie, *High Court Orders New Review of Michigan Title IX Case*, EDUC. WK. 28, 2005 WLNR 7939974, May 11, 2005 (quoting general counsel for National School Boards Association: "I see implications for No Child Left Behind, because they really are parallel requirements").

Notably, the Third Circuit's reasoning would permit these institutions to ban military recruiters from their campuses for any reason at all. The Third Circuit stated that "the District Court's scrutiny of the law schools' belief that the presence of military recruiters will undermine their expressive message about fairness and social justice violates the [*Boy Scouts of America* v.] *Dale* Court's instruction to 'give deference to an association's view of what would impair its expression.'" *F.A.I.R.*, 390 F.3d at 233. According to the court, "the reason why there was 'no question' . . . that a gay scoutmaster would undermine the Boy Scouts' message was because the Boy Scouts *said it would*." *Id.* (emphasis in original). Under this amorphous

[11] Section 503(c)(1)(A) provides the following with respect to access to secondary schools: "Each local educational agency receiving assistance under the Elementary and Secondary Education Act of 1965 . . . shall provide to military recruiters the same access to secondary school students as is provided generally to postsecondary educational institutions or to prospective employers of those students."

and entirely subjective standard, a college or university would be justified in banning military recruiters from its campus based on any objection to a given law or military policy—from a disfavored military operation abroad,[12] to base-closings, to any other of the military's recruitment standards, such as age and physical fitness.

This would, in essence, permit institutions of higher learning to allow the military to function on their campuses only when and if they see fit. Such arbitrary interferences with the military and national security—especially where those who wish to protest have numerous effective outlets for their views—are not imagined under the Constitution. They should not be required under the Constitution either.

[12] At least one high school has voted to prohibit military recruiting because of disagreement with the military's operations in Iraq. *See* Dean Paton, *Rift Over Recruiting at Public High Schools*, CHRISTIAN SCI. MONITOR, May 18, 2005.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

PHILIP B. ONDERDONK, JR.
National Judge Advocate
THE AMERICAN LEGION
P.O. Box 1055
Indianapolis, IN 46206

ROBERT P. PARKER
Counsel of Record
ANDREW J. PUGLIA LEVY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1615 L Street, N.W.
Washington, D.C. 20036
(202) 223-7300

Counsel for Amicus Curiae*

July 15, 2005

---

* We gratefully acknowledge the assistance of Maggie E. Sklar, a student at Georgetown University Law Center, in the preparation of this brief.